

On May 23, 1997, the Board received the City's Prehearing Brief (**City's PHB**).

Also on May 23, 1997, the Board received Ecology's Prehearing Brief (**Ecology's PHB**).

Petitioner Gilpin did not file a reply brief.

No dispositive motions were filed by the parties.

On June 5, 1997, the Board held the hearing on the merits at the Board's Office. Present were the Board's three members: Edward G. McGuire, Joseph W. Tovar and Chris Smith Towne, Presiding Officer. Court reporting services were provided by Jean Ericson, Robert H. Lewis & Associates. Gilpin appeared *pro se*; Maia D. Bellon represented Ecology; and Rod P. Kaseguma represented the City.

II. FINDINGS OF FACT

1. In 1995, the Washington State Legislature enacted Engrossed Substitute House Bill (**ESHB**) 1724, 1995 Wash. Laws chapter 347, amending the Growth Management Act (**GMA**). The bill added certain provisions of the Shoreline Management Act (**SMA**), Chapter 90.58 RCW, to the GMA. Specifically:

- Section 104 added the goals and policies of the SMA to the goals of the GMA. *See* RCW 36.70A.480(1).

- Section 108 expanded the Growth Management Hearings Boards' subject matter jurisdiction, found at RCW 36.70A.280(1)(a), to include review of challenges to the adoption or amendment of shoreline master programs adopted and approved pursuant to the SMA.

- Section 109 and Section 110 amended RCW 36.70A.290 and .300 to reflect the jurisdictional change in Section 108.

2. Section 311 of ESHB 1724 amended RCW 90.58.190 to establish the standard of review the Boards are to use to evaluate challenges to the adoption or amendment of shoreline master programs. *See* RCW 90.58.190(2).

3. On September 1, 1994, the City adopted its Comprehensive Plan pursuant to the requirements of the GMA. The Housing Element, at Goal 2, states that the City should "[m]aintain the stock of existing affordable and rent-assisted housing." Policy H 2.3 provides that:

Water-based housing (live-aboards) is a viable component of the present and future housing

stock of Bainbridge Island, and shall be subject to applicable environmental protection standards.CD-1, at 6.

4.On August 24, 1995, the City approved a draft Master Program, pursuant to the requirements of RCW 90.58.080, and submitted it to Ecology for review.

5.On November 26, 1995, Ecology approved the City’s Master Program, pursuant to the requirements of RCW 90.58.090.

6.On December 7, 1996, the City published notice of Ecology’s approval.PFR, at 2.

7.The Master Program policies provide, at V(D)13, that:

Floating homes should be prohibited.Houseboats and live-aboard vessels should be allowed only in those limited circumstances where their environmental and use impacts can be substantially avoided. CD-2, at 72.

8.The SMA defines “shorelines” as “all of the water areas of the state, including reservoirs, and their associated shorelands together with the lands underlying them; except (i) shorelines of statewide significance...”RCW 90.58.030(2)(d).

9.The SMA defines “shorelines of state-wide significance” as “those areas of Puget Sound and the Strait of Juan de Fuca and adjacent salt waters north to the Canadian line and lying seaward from the line of extreme low tide.”RCW 90.58.030(2)(e)(iii).

10.The shorelines of Bainbridge Island at issue here, where water-based housing may be located, are shorelines of state-wide significance.

III. GENERAL DISCUSSION

This dispute presents the first opportunity for the Board to examine its role regarding shoreline master programs.Because this case raises issues of first impression, the Board begins by providing a general discussion of the relationship between shoreline master programs and the GMA.

Under the GMA, a petition for review alleging noncompliance of a GMA enactment with the requirements of that Act must be filed with the Board within sixty days after publication by the legislative body of the county or city.RCW 36.70A.290(2)(a), (b).The date of publication for master programs or amendments to master programs is the date the local government publishes notice that the master program or amendment has been approved or disapproved by Ecology. RCW 36.70A.290(2)(c).

The Legislature granted the Board subject matter jurisdiction over master programs in RCW 36.70A.280(1)(a), which provides:

(1) A growth management hearings board shall hear and determine only those petitions alleging either:

(a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW (Emphasis added.)

The goals and policies of the SMA, set forth in RCW 90.58.020, are considered one of the goals of the GMA. RCW 36.70A.480(1). In addition, the goals and policies of an approved shoreline master program “shall be considered an element of the county or city’s comprehensive plan.” *Id.* All other portions of an approved master program “including use regulations, shall be considered a part of the county or city’s development regulations.” *Id.* Ecology’s “decision to approve, reject, or modify a proposed master program or amendment adopted by a local government planning under RCW 36.70A.040 shall be appealed to the growth management hearings board with jurisdiction over the local government.” RCW 90.58.190(2)(a).

Generally, in deciding a petition for review, the Board “shall find compliance [with chapter 36.70A RCW] unless it finds by a preponderance of the evidence that the state agency, county, or city erroneously interpreted or applied [chapter 36.70A RCW].” RCW 36.70A.320(1). However, the same legislation, ESHB 1724, that added certain provisions of the SMA to the GMA also established the Board’s standard of review (of Ecology’s actions) for challenges regarding shoreline master programs. *See* Finding of Fact 2. The standard of review to be used by a Board to review an action of Ecology approving or disapproving a master program submitted by a local government is different for “shorelines” and for “shorelines of state-wide significance.” If the appeal concerns “shorelines,” the Board “shall review the proposed master program for compliance with the requirements of [chapter 90.58 RCW] and chapter 36.70A RCW, the policy of RCW 90.58.020 and the applicable guidelines, ^[1] and chapter 43.21C as it relates to the adoption of master programs and amendments under chapter 90.58 RCW.” RCW 90.58.190(2)(b).

If the appeal concerns “shorelines of state-wide significance,” as in the instant case (Finding of Fact 9), the Board “shall uphold the decision by [Ecology] unless the board, by clear and convincing evidence, determines that the decision by [Ecology] is inconsistent with the policy of RCW 90.58.020 and the applicable guidelines.” RCW 90.58.190(2)(c) (emphasis added). Whether the appeal concerns shorelines or shorelines of state-wide significance, the burden of proof is on the appellant. RCW 90.58.190(2)(d).

IV. DISCUSSION AND CONCLUSIONS

The Board's Prehearing Order set forth the following Legal Issues:

1. Did Ecology fail to comply with the requirements of RCW 90.58.130 for citizen involvement and participation?

2. Did the City fail to comply with the requirements of RCW 90.58.130 for citizen involvement and participation?

3. Did Ecology fail to comply with the requirements of RCW 36.70A.140 for citizen involvement and participation?

4. Did the City fail to comply with the requirements of RCW 36.70A.140 for citizen involvement and participation?

5. Does Ecology's approval of portions of a Shoreline Master Program dealing with water-based housing violate RCW 36.70A.070 by creating an internal inconsistency between the Shoreline Master Program and the Housing Element of the Plan?

A. Legal Issues No. 1, 2, 3 and 4

Discussion

Legal Issues No. 1 through 4 concern public participation under RCW 90.58.130 and RCW 36.70A.140. Public participation is required by RCW 90.58.130 and RCW 36.70A.140. Although the City is required to consider public input it receives regarding its Master Program, it is not required to "agree with" or "obey" public input. *Buckles v. King County*, CPSGMHB Case No. 96-3-0022, Final Decision and Order (November 12, 1996), at 22; *Twin Falls v. Snohomish County*, CPSGPHB Case No. 93-3-0003, Final Decision and Order (September 7, 1993), at 77.

Gilpin's prehearing brief contains no argument that Ecology or the City failed to comply with the public participation requirements of SMA or GMA. In fact, Gilpin "acknowledges that proper legal notices were published and public meetings were held." Gilpin's PHB, at 5. "Petitioner asserts, however, that the final product of the SMP, that includes the prohibition of water-based housing demanded by [Ecology] and acceded to by [the City] violates the spirit of both the SMP [sic] and the [GMA] in that it ignores the consensus and majority desire of the community." Gilpin's PHB, at 6.

The Board holds that Petitioner's conclusory statement that the Master Program "violates the spirit of both the SMP [sic] and the [GMA]" because it "ignores the consensus and majority desire of the community" is insufficient to meet Petitioner's burden of proof,

whether under the preponderance of evidence standard or the clear and convincing evidence standard, to show that either the City or Ecology has not complied with the public participation requirements of the SMA and the GMA.

Conclusion

Petitioner has failed to meet her burden to show that Ecology and the City have not complied with the public participation requirements of the SMA and the GMA.

B. LEGAL ISSUE NO. 5

Discussion

[2]

The sole remaining issue is Legal Issue No. 5.

Under the Shoreline Management Act, each local government is required to develop a shoreline master program in accordance with the policies enunciated in RCW 90.58.020.RCW 90.58.030(3)(b); RCW 90.58.080.Local governments submit proposed master programs to Ecology for review and approval.RCW 90.58.090(1). Ecology “shall approve those segments of the master program relating to shorelines of state-wide significance only after determining the program provides the optimum implementation of the policy of [chapter 90.58 RCW] to satisfy the state-wide interest.”RCW 90.58.090(4).A master program becomes effective when approved by Ecology. RCW 90.58.090(6).Although master programs are adopted pursuant to chapter 90.58 RCW, the goals and policies of an approved master program are considered an element of the county or city’s comprehensive plan.RCW 36.70A.480(1).

As stated in the General Discussion, only the goals and policies of an approved master program are considered an element of a comprehensive plan.“All other portions of the shoreline master program for a county or city adopted under chapter 90.58 RCW, including use regulations, shall be considered a part of the county or city’s development regulations.”*Id.*Challenges that development regulations are inconsistent with comprehensive plans must be brought under RCW 36.70A.040(3)(d).The present challenge to Ecology’s action is limited to internal comprehensive plan consistency under RCW 36.70A.070.

The City submitted its proposed Master Program to Ecology.Ecology reviewed and approved the City’s Master Program.Gilpin alleges that Ecology’s approval violates RCW 36.70A.070.

Gilpin has offered no argument that Ecology’s approval of the City’s Master Program is “inconsistent with the policy of RCW 90.58.020 and the applicable guidelines.”Instead, Gilpin argues that portions of the Master Program are inconsistent with the housing element of the City’s Comprehensive Plan.*See* Gilpin’s PHB, at 4.However, since the Legislature has limited the

Board's scope of review of Ecology's actions where shorelines of state-wide significance are concerned, Gilpin's arguments are not helpful.

The Board holds that Ecology, in approving a master program or portions of a master program concerning shorelines of state-wide significance, is not subject to RCW 36.70A.070. Instead, Ecology's action in such a case must be reviewed for consistency with the policy of RCW 90.58.020 and the applicable guidelines.RCW 90.58.190(2)(c).Gilpin has not challenged Ecology's approval of the City's Master Program under RCW 90.58.020 and the applicable guidelines.

Conclusion

Ecology's approval of a master program or portions of a master program concerning shorelines of state-wide significance is not subject to RCW 36.70A.070.The requirement to achieve consistency among the City's comprehensive plan elements is the City's duty, not Ecology's. Ecology's approval must be reviewed for consistency with the policy of RCW 90.58.020 and the applicable guidelines.Petitioner has not challenged Ecology's approval of the City's Master Program under RCW 90.58.020 and the applicable guidelines.

V. ORDER

Having reviewed and considered the above-referenced documents, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS that Gilpin's petition for review is **dismissed with prejudice**.

So ORDERED this 30th day of June, 1997.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP
Board Member

Joseph W. Tovar, AICP
Board Member

Chris Smith Towne
Board Member

Note:This Final Decision and Order constitutes a final order as specified by RCW 36.70A.300 unless a party files a Petition for Reconsideration pursuant to WAC 242-02-830.

[\[1\]](#) The "applicable guidelines" are found at WAC 173-16-040.

[2]

The Board notes that the City has briefed the issue of whether the City is in compliance with RCW 36.70A.070. However, this issue was not raised in the PFR nor included as a Legal Issue in the Prehearing Order. Gilpin has offered no argument that the City failed to comply with RCW 36.70A.070. Therefore, the Board need not, and will not, address the City's argument on this issue.